

EX PARTE COMMUNICATIONS

INITIAL STATEMENT OF REASONS

BACKGROUND TO AND SPECIFIC PURPOSE OF THE PROPOSED REGULATORY CHANGE

The San Francisco Bay Conservation and Development Commission proposes to delete existing Commission Regulation Section 11325 and to adopt new Commission Regulation Sections 10280 through 10289.

Existing Commission Regulation Section 11325 establishes the Commission's policy on ex parte communications between Commission members and interested parties and the public in Commission enforcement cases. Section 11325 is binding on the Commission because the Commission adopted it as a regulation. Commission Resolution 24(A) as modified in 1975 establishes a policy on ex parte communications that applies to permit and federal consistency matters. The policy contained in Resolution 24(A) as modified is not binding because the Commission never adopted it as a regulation.

From 2001 through 2003, the Commission appointed a special committee to consider the various issues that had arisen and to report back with recommendations. The committee met six times and reported its recommendations to the Commission, which directed the staff to commence formal rulemaking to adopt the proposed policies as regulations.

Thereafter, the Commission determined that provisions of the California Administrative Procedures Act that establish a policy on ex parte communications in adjudicatory matters would apply to Commission adjudicatory actions.

These proposed regulations will establish a policy and procedures that are consistent with the Administrative Procedures Act and also as consistent as possible with the Commission's preferred approach to ex parte communications.

PROBLEM

When the Commission acts on permit applications, consistency determinations and certifications, and resolves enforcement cases, both the U. S. and California Constitutions and the California Administrative Procedures Act require that written and oral communications to Commission members regarding these matters occur as part of, and not outside, of the normal Commission proceedings, e.g., public hearings and procedures for the submittal of written materials. They also require that when the nevertheless occur, they be properly and promptly disclosed.

However, Commission members still receive ex parte communications. The Commission wants a clear policy and set of procedures to follow to ensure openness and fairness in its proceedings and to avoid a potential violation of state law.

PROPOSAL/RATIONALE/NECESSITY

The Commission acts in an adjudicatory manner, also referred to as a quasi-judicial manner, when it applies its general policies to a specific set of facts. This type of

activity includes the review of a permit application, the review of a federal consistency determination or certification, and the consideration of a Commission enforcement action. When the Commission acts in this manner, the due process requirements of the federal and state constitutions generally require that the business of the Commission be conducted during its regularly scheduled meetings that are open to the public and subject to public comment and rebuttal and that discussions that do not occur at that time should be disclosed on the record of the agency and the public given an opportunity to respond before the agency reaches a decision on the matter being considered.

The Commission believes that the Commission ought to conduct its adjudicatory activities generally in public at its meetings and that discussions or communications concerning such Commission actions that occur outside of normal Commission meetings and procedures for the submittal of written statements, commonly referred to as “ex parte communications,” should be disclosed in a timely and appropriate manner. The Commission also believes that the public should be allowed to comment and rebut as necessary an ex parte communications before the Commission takes any action on the proposal.

However, the Commission also acknowledges that there are some circumstances where prohibiting a communication from occurring outside of the Commission’s meetings or requiring the disclosure of such a communication is neither practical nor appropriate and therefore should not be treated as an ex parte communication. Examples of such types of communications include a communication specifically authorized by statute and required for the disposition of a matter, a communication that involves a matter of procedure or practice that is not in controversy, a communication from a BCDC staff person who has not and is not involved in the matter, a communication from a BCDC staff person involving a settlement proposal, or a communication from a BCDC staff person that involves a non-prosecutorial proceeding .

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

The Commission did not rely on any technical, theoretical, or empirical studies, report, or document in determining the nature or precise text of the proposed regulations. However, the rulemaking file contains a variety of historical and relatively current documents, including

1. memo from E. Clement Shute Jr. to Charles Roberts dated July 2, 1974;
2. Commission minutes of August 1, 1974, page 2;
3. Commission minutes of April 15, 1974, pages 2-3;
4. Commission minutes of September 19, 1974, page 3;
5. Proposed Resolution Regarding Private Contacts dated October 3, 1974;
6. Commission meeting minutes of October 3, 1974, pages 2-4;
7. Commission Resolution No. 24(A);
8. memo from E. Clement Shute Jr. to Charles Roberts dated August 25, 1975;
9. memo from E. Clement Shute Jr. to Commissioners dated September 19, 1975;
10. Commission staff report from Charles Roberts to All Commissioners and Alternates dated September 29, 1975;
11. Commission minutes of October 16, 1975, pages 5-7;
12. Letter from Will Travis to J. Matthew Rodriguez dated March 7, 2001;
13. Letter from Joseph Remcho to Barbara Kaufman dated April 16, 2001;
14. Letter from Will Travis to J. Matthew Rodriguez dated April 27, 2001;

15. Letter from Joseph Barbieri to Will Travis dated November 14, 2001;
16. Commission staff report and recommendation from Will Travis and Jonathan Smith on Ex Parte Communications dated February 8, 2002;
17. Commission Meeting Minutes for February 21, 2002;
18. Commission staff report to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated March 8, 2002;
19. Commission staff report to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated April 19, 2002;
20. Commission staff report and recommendation to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated July 12, 2002;
21. Commission staff report and recommendation to All Commissioners and Alternates from Will Travis and Jonathan Smith dated August 2, 2002;
22. Commission meeting minutes of August 15, 2002, pages 5-14;
23. Commission staff report to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated September 20, 2002;
24. Draft Committee report and recommendation to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated November 8, 2002;
25. Committee report and recommendation to Commissioners and Alternates from Ex Parte Communications Policy Committee dated January 24, 2003;
26. Commission meeting minutes of February 6, 2003, pages 18-23; and
27. Cal. Public Resources Code Sections 30320 through 30329.
28. BCDC Answers to Typical Questions About Ex Parte Communications, May 2, 2003

REASONABLE ALTERNATIVES AND THE COMMISSION'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Commission considered a wide variety of issues and alternatives when it held committee meetings and considered this matter itself. Those general policy alternatives included: (1) not adopting any regulation and simply relying on California statutory and case law; (2) retaining the binding policy for enforcement matters and the nonbinding policy for permit matters; or (3) adopting a new policy and make it enforceable as a regulation.

The Commission concluded that it would be best to adopt a new set of regulations. Not adopting any regulation and simply relying on California statutory and case law would be more difficult for Commission members, interested parties, and members of the public to find and to understand. Retaining existing policies would not be binding in all but enforcement matters because only the policy regarding enforcement matters has been adopted as a regulation. The existing policy on enforcement matters is not fully consistent with the California Administrative Procedures Act. Adopting a new policy as a set of regulations is the best way to ensure that the Commission, interested parties, and members of the public will all act in a manner that is consistent with state law.

The Commission also considered various specific issues and alternatives approaches to each issue, including: (1) should the policy require avoidance of an ex parte communication as a primary response or only require the appropriate disclosure of an ex parte communication when one has occurred, (2) how narrow or broad should the policy be, (3) should the policy retain the existing distinction for permit applications between pure policy discussions and communications that involve the application of

policy to specific facts of a quasi-judicial matter, (4) should the policy also apply to quasi-legislative matters, such as plan amendments, (5) when should the policy begin to apply, (6) how detailed should the required disclosure be, (7) when should disclosure be required, (8) how should the policy deal with a communication that occurs in a public meeting that has been properly noticed, (9) how should the policy deal with discussions in a social setting, (10) how should the policy deal with email communications, (11) how should the policy deal with an oral communication received by a Commission member after the close of the public hearing or with a written communication received after the close of the period for the receipt of written communications, and (12) how should the policy deal with field trips by individual Commission members?

Many of the answers to these policy questions are resolved by the California Administrative Procedures Act. Cal. Govt. Code Section 11430.10 expressly prohibits ex parte communications except as expressly exempted by the Cal. APA. The Cal. APA also does not make any distinction between so-called “pure policy” communications and other communications. Both the Cal APA and case law interpreting the U. S. and California Constitutions make clear that any prohibition against ex parte communications applies only to adjudicatory matters, also known as quasi-judicial matters. The two terms are synonymous. The prohibition does not apply to quasi-legislative proceedings.

The Commission believes that it is impractical to apply a policy prior to the commencement of formal permit, consistency action, and enforcement review. This occurs when a permit application is submitted for permits, when a consistency determination or certification is submitted for consistency matters, and when the staff mails a violation report or a complaint for the imposition of civil penalties.

Cal. Govt. Code Sections 11430.40 and 11430.50 establish the manner and degree of disclosure that is required if an ex parte communication occurs. They also establish when the disclosure must occur.

The Cal. APA makes no exceptions for communications that may occur in a properly-noticed public hearing or meeting involving an agency other than BCDC, for communications that occur in a social setting, or for email communications.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Commission believes that the proposed regulatory action would not have any adverse impact on small business and has not identified any reasonable alternative that might lessen any adverse impact on small business. The proposed regulatory action would simply regulate communications between Commission members and interested parties and persons and members of the public.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulatory action would only limit contacts outside of the normal hearing process for adjudicatory matters that the Commission considers. It would not prohibit them under all circumstances and it would not affect the ability of all interested parties and members of the public from submitting written materials to the Commission as an institution or to all Commission members, thereby ensuring that all Commission

members see the material, or from appearing and speaking at Commission public hearings. The proposed policy and regulations deal only with what Commission members can and cannot or should not do with regard to ex parte communications in an adjudicatory proceeding, such as action on a permit application, on a consistency determination or certification, or on an enforcement matter. They would not have any significant adverse impact on any business.